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No. 73-1778

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

WILLIAM H. RODGERS, JR., Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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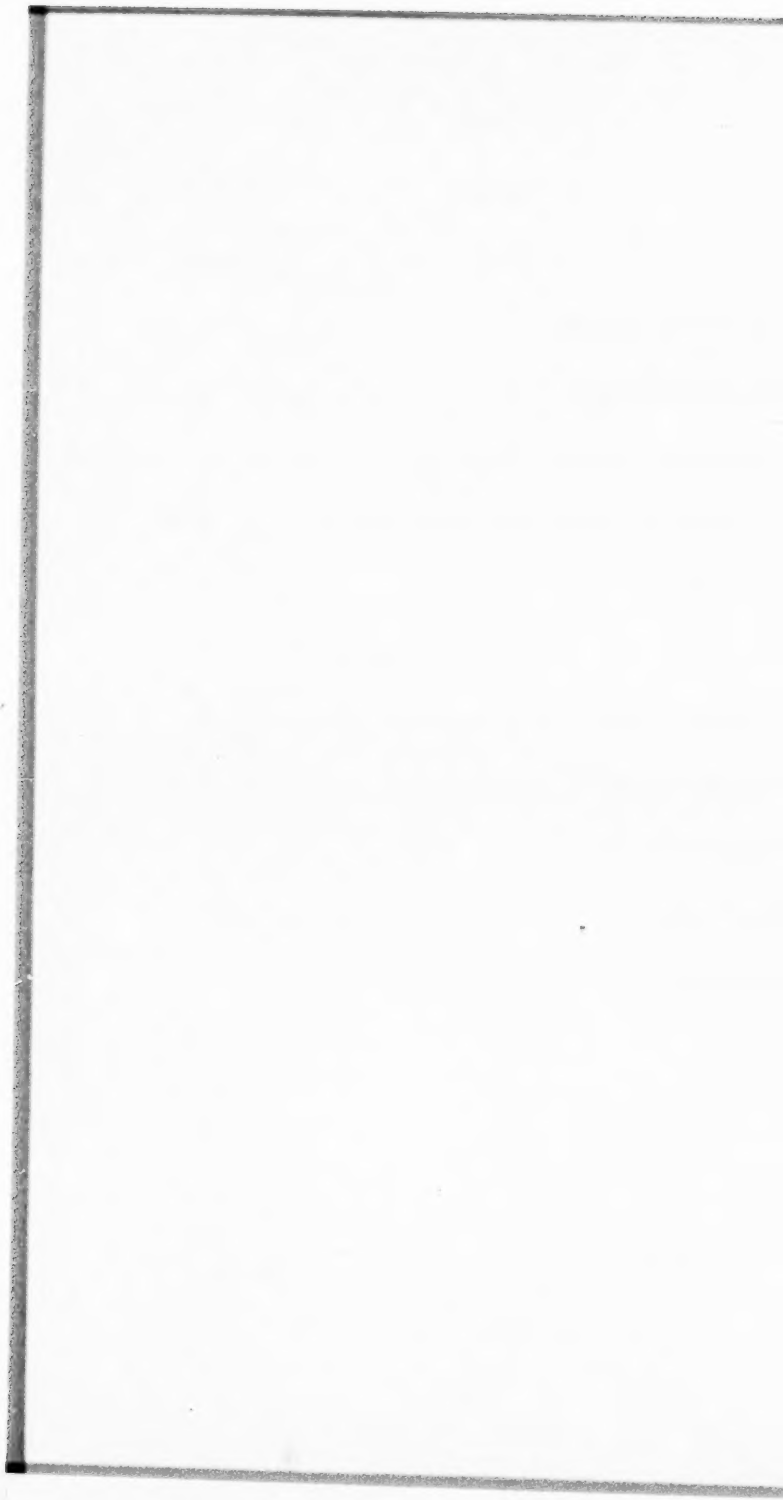

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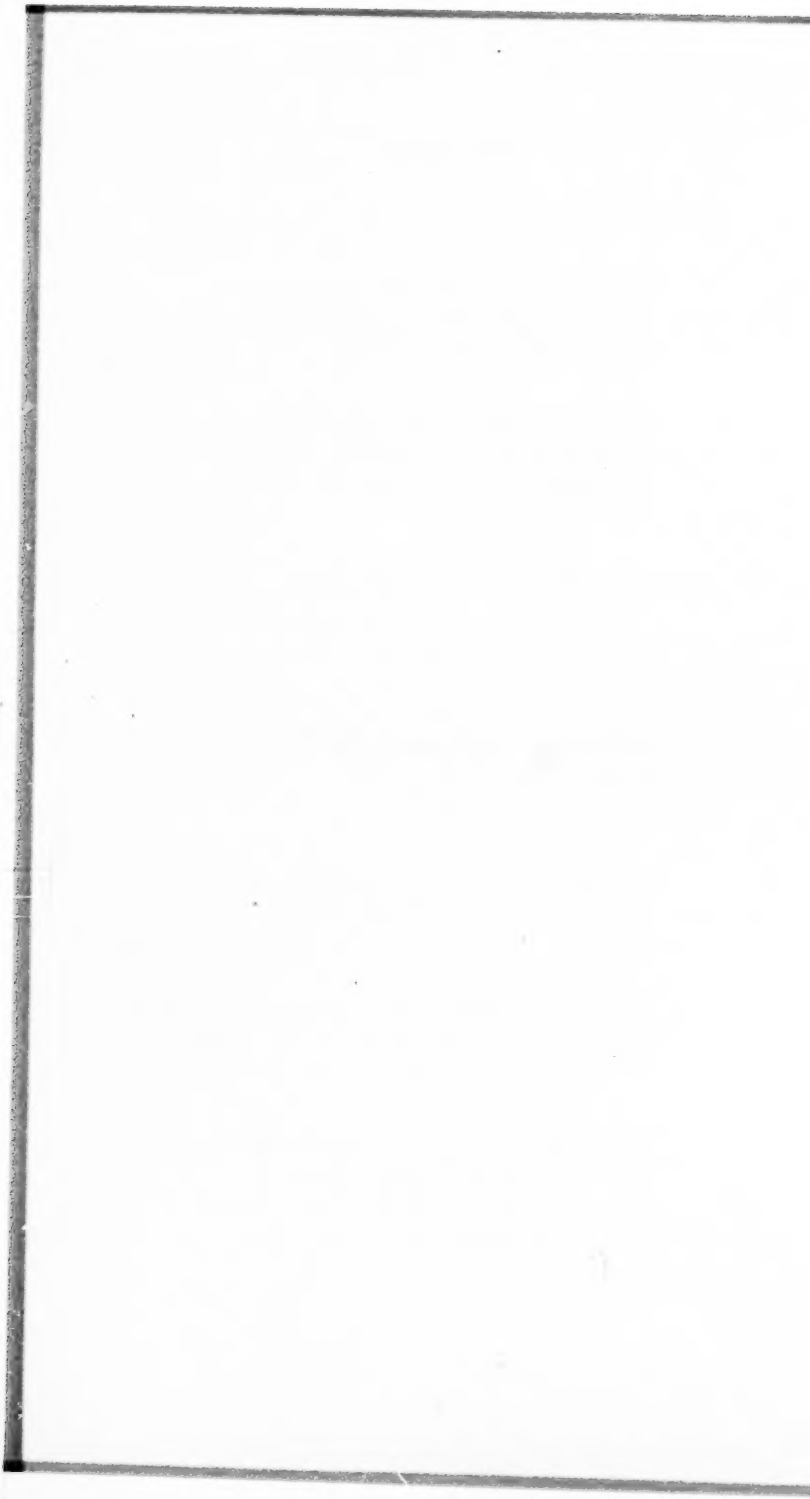

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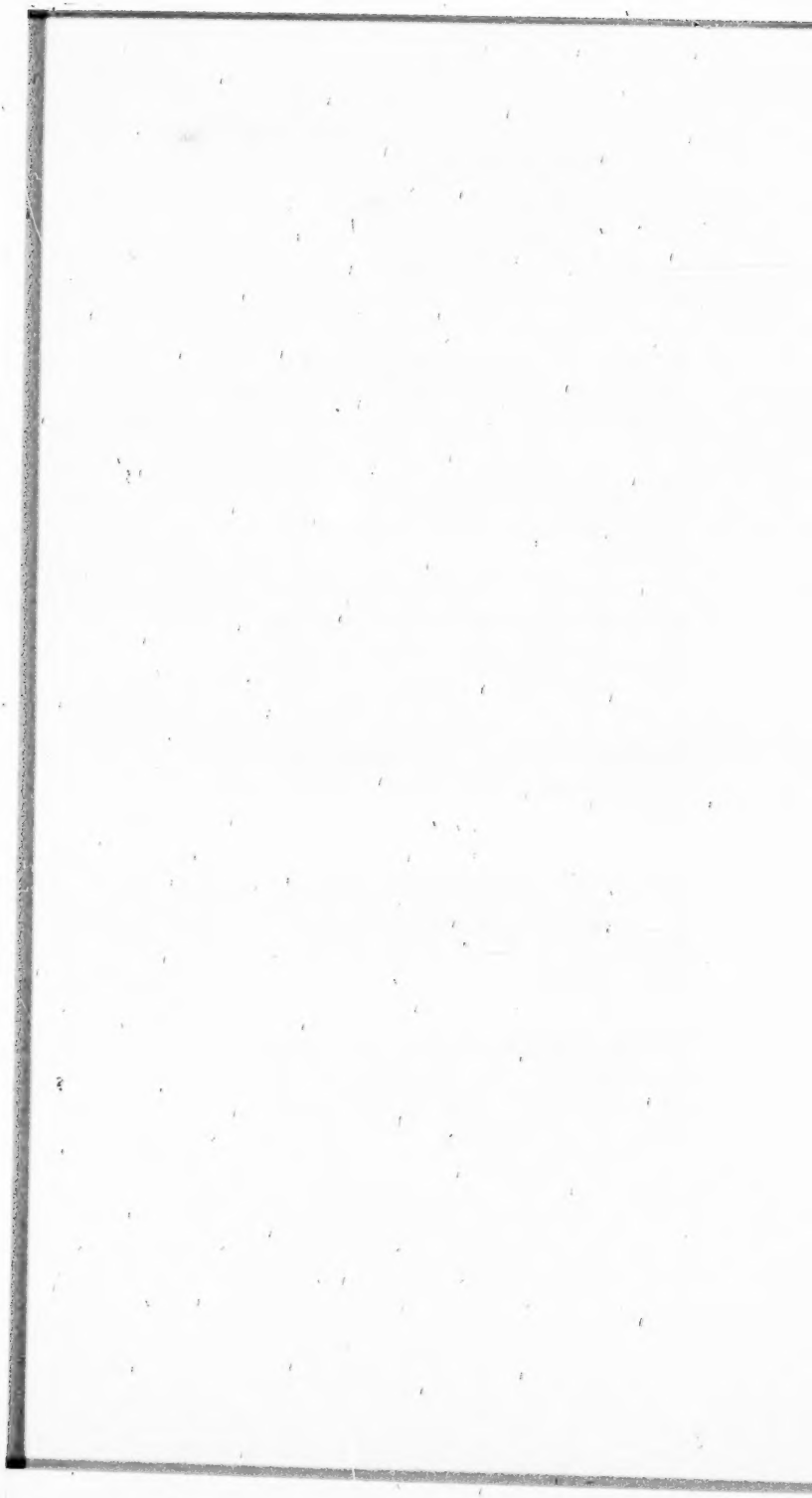

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v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William H. Rodgers, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on February 25, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra) is reported at 492 F.2d 228.

The opinion of the United States District Court for the Western District of Washington at Seattle denying petitioner's motion for summary judgment and granting respondent's motion to dismiss (Appendix B, infra) is unreported.

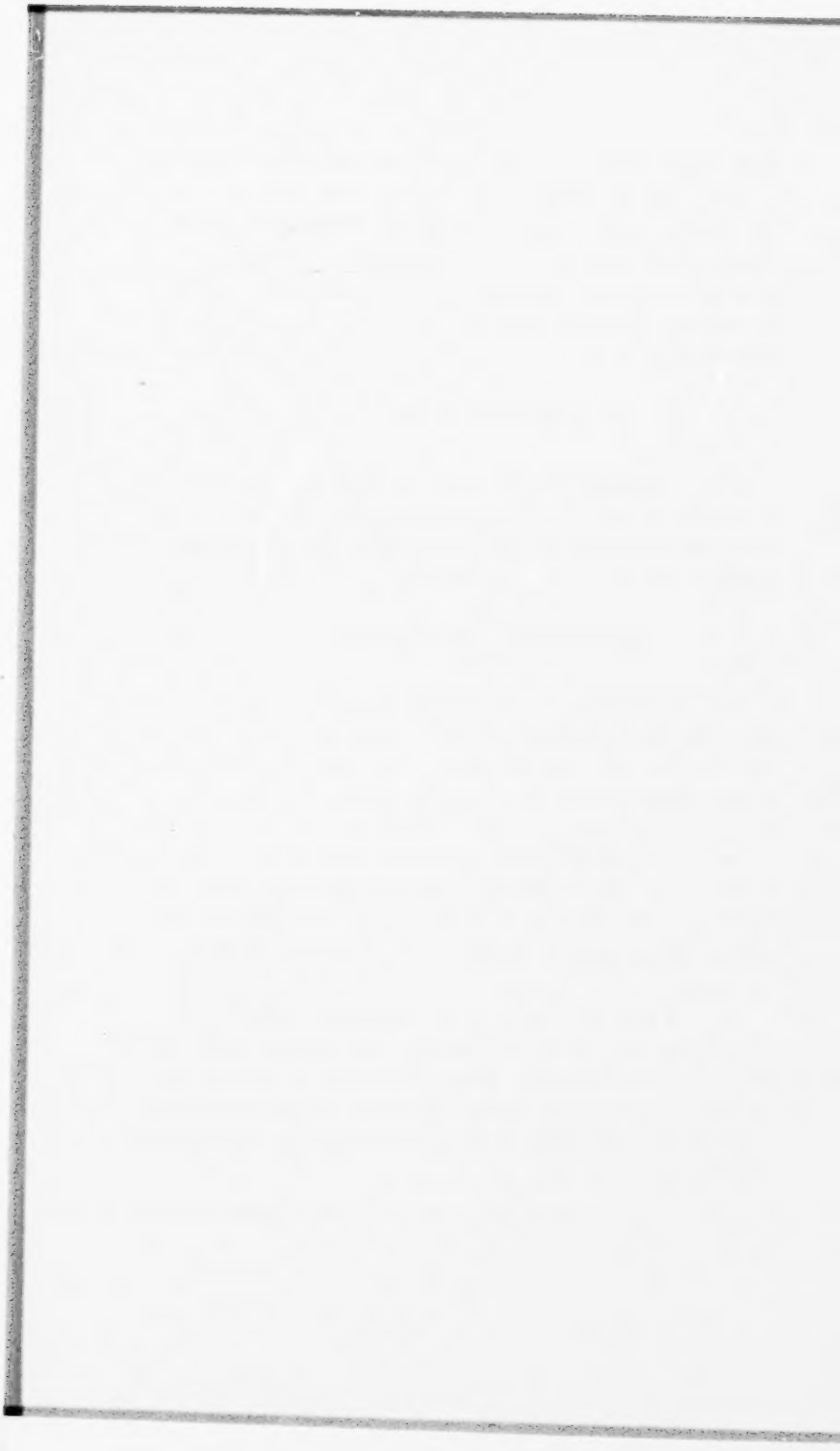
JURISDICTION

The judgment of the court of appeals was entered on February 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the free speech limitations on the antitrust laws, enunciated by the decision of this Court in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), protect conspirators who employ illegal means to influence governmental action affecting their commercial interest in non-returnable beverage containers.

2. Whether Noerr protects explicit threats of price fixing by beer and soft drink producers, supermarket chains and others entered into during a political campaign to ban non-returnable beverage containers.



3. Whether joint lobbying by large competitors constitutes, in the circumstances alleged, a violation of Section 5(a)(1) of the Federal Trade Commission Act.

STATUTES INVOLVED

1. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45 (a)(1), is set forth in Appendix D, infra.

2. Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, is set forth in Appendix D, infra.

STATEMENT /1

This action arises out of a 1970 initiative campaign in the State of Washington aimed at curtailing throw away of non-returnable beverage containers. On December 11, 1970, petitioner,

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1 The facts as stated were alleged in petitioner's complaint and supporting documentation submitted to the Federal Trade Commission. Respondent's motion to dismiss and petitioner's cross-motion for summary judgment before the District Court were based on strictly legal grounds and disclose there is no genuine issue as to any material fact.

then an Assistant Professor of Law at the University of Washington,[2] complained to the Federal Trade Commission that activities taking place during the campaign constituted unfair and deceptive practices within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45 (a)(1) (Appendix D, infra). He requested an investigation and the initiation of proceedings against responsible principals. The measure involved was Initiative 256, an "anti-litter" proposition, which, if adopted, would have forbidden the sale in the State of Washington of beer and soft drink in containers not having a refund value of at least five cents. It was rejected by the voters on November 3, 1970 by a narrow margin of fifty-one to forty-nine on a percentage basis.

The letter of complaint and supporting documentation to the Commission charged that the opponents of the measure, including supermarket chains, beer and soft

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[2] Petitioner is now a Professor of Law at the Georgetown University Law Center. He intends to vote and remains a property owner in the State of Washington.

drink producers and container manufacturers, engaged in a massive campaign of deception and economic coercion. One of several exhibits submitted to the Commission and part of the certified record to be filed in this Court was the draft of a then-unpublished article[3] by petitioner describing his version of the campaign. This exhibit alleged, among other things, violations of Rev. Code Wash. § 29.79.490(6), which forbids a corporation with a majority of out-of-state shareholders from contributing to local initiative campaigns. The documentation further charged that the initiative was opposed through heavy expenditures for newspaper advertisements, T.V. and radio "spot" announcements, billboard and yard signs, campaign leaflets, bumper stickers and decals on beverage cartons sold in supermarkets. Clearly identified were specific price and employment allegations jointly made by the opposition: "50 percent higher prices for beer, soft drinks", if the initiative passes; "Deposits and Handling Costs will Add 48¢ per Six-Pack Under Initiative 256"; it "will increase your

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3 The article was revised and published as "Ecology Denied: The Unmaking of a Majority", Washington Monthly, Feb., 1971. It was republished, with further substantial revisions, as a chapter in a book authored by petitioner (Corporate Country, Rodale Press, 1973).

grocery bill $60.00 annually for an average family of four". "Simply stated," recited petitioner's letter of compaint to the FTC, "the illegality here alleged is that the grocery chain stores and the manufacturers of beer and soft drink combined, in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices".

On January 26, 1971, Mr. Charles A. Tobin, the Secretary of the Commission, responded to petitioner's complaint (Appendix C, infra), concluding that the activity described "at most"amounted to "joint efforts to influence legislation". The Commission found no actionable violation "even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception."

On April 8, 1971, petitioner filed an action in the District Court for the Western District of Washington seeking injunctive and declaratory relief to correct what was alleged to be an error of law. The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1337. The complaint summarized the allegations as follows:

Plaintiff's complaint and supporting documentation to the FTC depicted a massive conspiracy among beer and soft drink manufacturers, retail supermarkets and others to defeat Initiative 256 with a campaign of vilification, distortion and falsehoods. The campaign involved use of the 'third-party technique' where the conspirators issued prepared propaganda statements through supposedly independent groups, such as the Citizen's Committee Against Initiative 256 and the Washington Committee to Stop Litter. The conspiracy included a saturation public relations campaign through newspaper, television, radio and other outlets costing as much as two million dollars. It was accomplished in part in violation of Washington State law which forbids corporations with a majority of out-of-state shareholders from making

contributions in local initiative campaigns. Through numerous false and misleading statements, the conspirators engaged in a concerted effort to defend their production technology and distribution practices from improvements mandated by law and initiated by competitors. On questions of feasibility and costs the conspirators presented their views which included false statistics and misleading technical data, on a joint basis. They threatened joint price increases and joint moves to implement massive lay-offs if the initiative passed. The purposes of the conspiracy were anticompetitive by seeking to protect investments in certain technology and distribution practices, to bar entry by competitors into markets for returnable containers, and to accelerate the elimination of competitors unable to make costly investments in the production of non-returnable containers.

On September 17, 1971 the District Court granted defendant's motion to dismiss, ruling that the matter was committed to the discretion of the Federal Trade Commission and was, in any event, barred by the decision in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

The Court of Appeals (Circuit Judges Koelsch and Trask and District Judge Jameson, sitting by designation), assumed without deciding that the action was reviewable,[4] and affirmed expressly on the ground that the activities described were protected by Noerr.

REASONS FOR GRANTING WRIT

I. In holding that the Noerr decision protected the activities described in the complaint, the Court of Appeals sanctioned a dangerous exception to the antitrust laws in a way that conflicts with applicable decisions of this Court and of the other circuits.

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[4] Petitioner submits that there is no substantial issue as to the reviewability of the Commission's decision since what is involved is an effort to correct an error of law. See e.g. 5 U.S.C. § 706 (2)(A); Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970).

It has long been held that price-fixing agreements are per se violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (Appendix D, infra), see United States v. Trenton Potteries, 273 U.S. 392 (1927), and a fortiori of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (Appendix D, infra). Virginia Excelsior Mills v. Federal Trade Commission, 256 F. 2d 538 (4th Cir. 1958). The Commission and Courts below, conceding the force of this rule of law, nonetheless sought to avoid it by invoking this Court's decision in Noerr.

Noerr and a subsequent case, United Mineworkers v. Pennington, 381 U.S. 657 (1965) have been widely commented on in the law reviews.[5]

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[5] Costilo, Antitrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich. L. Rev. 333 (1967); Walden, More About Noerr-Lobbying, Antitrust, and the Right to Petition, 14 U.C.L.A. L. Rev. 1211 (1967); Comment, Lobbying Before Licensing Agencies: Noerr-Pennington Reassessed, 51 Bost. U. L. Rev. 90 (1971); Note, Application of the Sherman Act to Attempts to Influence Government Action, 81 Harv. L. Rev. 847 (1968).

Noerr held that concerted attempts to influence governmental action are immune from the antitrust laws even though the action sought would result in a restraint of trade. A railroad association's efforts to secure state legislation harmful to truckers who competed with railroads were thus held to be exempt from the Sherman Act despite proof that the conduct challenged was deceptive, unethical (particularly by use of the "third-party technique") and designed to induce the government to impose a restraint of trade. The Court in Noerr offered two rationales for its holding: first, there is a compelling interest in insuring the free flow of information to those who make the law. Second, the Constitutional right to petition is lightly ignored by application of the antitrust laws. Read together, the salient point is that trade associations or groups of competitors, like anybody else, have a right to petition their representative. This is true though the group may seek to bring about legislation that would restrain competitors.

Until the instant cause, the Courts of Appeals had ruled firmly to prevent the transformation of Noerr into an open-ended First Amendment exemption to the antitrust laws for violations

arguably involving some kind of "political" activity. A strong line of case law emerged establishing that Noerr offers no carte blanche to conspirators who would bribe, dupe or mislead the decision-maker. If the government decision implementing the anti-competitive scheme is invalid because it was secured by illegal means, the Noerr immunity vanishes. So, too, does the exemption fail if the decision-making process does not have sufficient procedural safeguards to prevent conspirators from practically dictating what the outcome will be. Nor does Noerr apply if activity undertaken in a political campaign is but incidental to a broader effort to destroy competition under the guise of participation in the political process.

The opinion in Noerr itself was careful to point out that anti-competitive activity resulting only from valid governmental action does not violate the antitrust laws. See 365 U.S. at 136. Cases involving corruption of the decision-making process are a different matter. Thus, in Harmon v. Valley Nat'l Bank, 339 F. 2d 564 (1964), the Ninth Circuit held that the joint action of the defendants in inducing the Attorney General of Arizona to file a proceeding to place a competitor in receivorship was subject to the antitrust laws because

of allegations that "the acts of the Attorney General were those of a participating conspirator." Id. at 566. This Court in Pennington later stressed that the official there sought to be influenced was "not claimed to be a co-conspirator." 381 U.S. at 697. Similarly, antitrust violations in Rangen, Inc., v. Sterling, Nelson, and Sons, Inc., 351 F. 2d 851 (9th Cir. 1965), cert. denied 383 U.S. 936 (1966) were premised upon attempts to influence a government purchasing agent. See George R. Whitten, Jr., Inc., v. Paddock Pool Builders, Inc., 424 F. 2d.25 (1st Cir. 1970) (same). As another panel of the Ninth Circuit pointed out in Sacramento Coca-Cola Bottling Co. v. Local 150, Teamsters, 440 F. 2d 1096, 1099 (9th Cir. 1971), Noerr does not protect conspirators who resort to illegalities and coercion to influence governmental action:

> Further, it does not seem to this Court that the doctrines of Noerr and Pennington were intended to protect those who employ illegal means to influence their representatives in government. These doctrines were enunciated to see that the antitrust laws did not impede

> the free flow of communication between people and the government. But there can be little reason to extend the special immunity of Noerr and Pennington to a type of 'communication' which includes threats and other coercive measures. There is no room for such tactics in a democratic system.

The decision of the Ninth Circuit in the instant cause is fundamentally at odds not only with the decisions above but also with Israel v. Baxter Labs, Inc., 466 F. 2d 272 (D.C. Cir. 1972), which found factual questions necessitating remand in plaintiffs' allegations that defendants conspired to preclude, not induce, fair consideration by the Food and Drug Administration of the safety and efficacy of plaintiffs' competitive drug. The decision below is irreconcilable with the dicta in Semke v. Enid Automobile Dealers Ass'n, 456 F 2d 1361, 1366-67 (10th Cir., 1972) where the criteria for decision was whether "defendants were guilty of fraud, corruption or misuse of the state processes." So, too, the decision below is contrary to Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F. 2d 1286 (5th Cir. 1971), in which plaintiffs allege that two large-tract natural gas

producers violated the antitrust laws by filing false nomination forecasts with the Texas Railroad Commission (which had the power to prescribe the amount of gas to be produced from each tract) in order to reduce the production allowed others, especially small producers. The Court there reversed a grant of summary judgment and remanded for a determination of whether or not defendants in fact filed false nominations.

An important consideration in these corruption of process cases is whether the government decision-maker targeted his thought to be vulnerable to seduction or influence. Thus Woods Exploration and Producing Co. stressed that the data for decision was peculiarly within the control of those seeking official action and beyond effective scrutiny of the decision-maker. 438 F. 2d at 1296. And George R. Whitten, Inc., saw the issue as "not whether the action was in form 'governmental', but whether the real decision-makers were public officials or private businessmen." 424 F. 2d at 33 n.8. In these times it is not presumptive to suggest that illegal campaign contributions, such as those here alleged, may be important indicators of political success. There is direct, albeit limited, evidence that success in

initiative campaigns can be closely correlated to the size of the campaign fund.[6]

This impressive line of authority stands, quite simply, for the proposition that noble concepts of open communication espoused by Noerr break down where the recipient of the message is bribed, duped, misled or otherwise corruptly influenced. Free speech considerations justifying joint submission to government decision-makers do not excuse illegal attempts to influence.

These principles are dispositive here. Beyond the claims of unethical conduct in Noerr, the complaint in this cause alleges violations of state law governing campaign contributions. It alleges futility in relying upon other state laws to govern campaign practices:

> The conspiracy depicted in plaintiff's complaint and supporting documentation to

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6 The data available includes an early study from California indicating that special interests with heavy financial backing prevailed in seven of seven ballot campaigns. See Report of the Senate Committee Appointed to Investigate Expenditures For and Against Measures on the Ballot Held on November 7, 1922, Senate Daily Journal 1780 (May 14, 1923).

> FTC, apart from the antitrust laws, is not subject to effective regulation by other laws, such as limitation on campaign expenditures or full reporting statutes, libel laws, or other laws preventing groups of competitors from taking advantage of other competitors or consumers having an adverse interest. Procedural safeguards assuring an objective and comprehensive analysis of the conspirators' false and misleading statements are not available in a Washington State initiative campaign.

The complaint depicts a corruption of the decision-making process no less than the bribing of a purchasing agent in Rangen, the seduction of the Attorney General in Harmon, or the threats and coercion in Sacramento Coca-Cola Bottling Co. By alleging that the laws governing the transmission of information in initiative campaigns were violated, the complaint makes out a case where the decision-maker (here the public) was disabled from making a judgment unimpeded by illegalities which Noerr requires.

The Court below construed too narrowly the range of influences capable of corrupting the political processes upon which the Noerr exemptions depend. It is true that "no charge is made of interference with voters at the polls or any infirmity in the election tabulation." Appendix A, infra at 35 . It would, concedely, be a clearer case if the opponents of Initiative 256 were alleged to have conspired to beat up voters at the polls, buy them off, or stuff the ballot boxes. But these cruder forms of interference from days past surely do not exhaust the modern methods including prominently, by all accounts, illegal campaign contributions.

In narrowly construing the corruption of process exception to Noerr, the Ninth Circuit also misread this Court's recent decision in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The Court there construed the allegations as charges that truckers who routinely opposed competitors' license applications "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process." 404 U.S. at 512. Although the opposition was

genuine, it was part of a broader anti-competitive scheme and thus vulnerable under the antitrust laws.

The Ninth Circuit in the instant cause narrowly read Trucking Unlimited as requiring, in the context of Initiative 256, actual interference with the proponents' right to argue to the electorate or participate in the decision. Appendix A, infra, at 35. Properly read, however, Trucking Unlimited extends to broader means of "misuse or corruption of the legal process." Semke v. Enid Automobile Dealers Ass'n, supra, 456 F. 2d at 1366. It should embrace without question domination of political opinion through money illegally contributed.

II. A separate and distinct ground for reviewing this case is found in the so-called "sham" exception explicitly acknowledged by Noerr. 365 U.S. at 144. As the Court below indicated, the exception "would apply where the activity complained about is a mere screen for what in fact is an attempt to interefere with the business relationships of a competitor." Appendix A, infra, at 35. And it would apply a fortiori where the activity complained about is a mere screen for implementing an illegal price fixing scheme affecting consumers.

In this context, the threatened joint price increases of the opponents of Initiative 256 - "50 percent higher prices for beer, soft drink", "48 Cents per Six-pack" - must be forthrightly condemned. Were such increases to be jointly implemented the week after Initiative 256 became law, the conspirators would be fair game under the antitrust laws. If a written agreement to raise the price of each six-pack by 48 cents was consumated before the election and made conditional upon approval of the initiative, the signatories would surely be vulnerable as price fixers.

It is fair to inquire whether any free speech policy is vindicated by tolerating threats (or promises) to implement such illegal economic action, particularly when those making the threats are well situated to carry them out. The question is not answered by labeling the advertising on prices during the Initiative 256 campaign as mere political talk as opposed to economic action. In this context, the joint promise of higher prices was specific, imminent, highly credible and, if the results of the election are an indicator, ultimately persuasive. Under the circumstances alleged, the petitioner fails to see a vindication of free speech

policies by tolerating joint announcements to implement illegal price fixing. It is submitted that Noerr itself would have been decided differently if the railroads had, while urging the Governor of Pennsylvania to veto a bill favored by the truckers, advised him that a failure to do so would bring an across-the-board ten percent rate increase for shipments of state-owned freight.

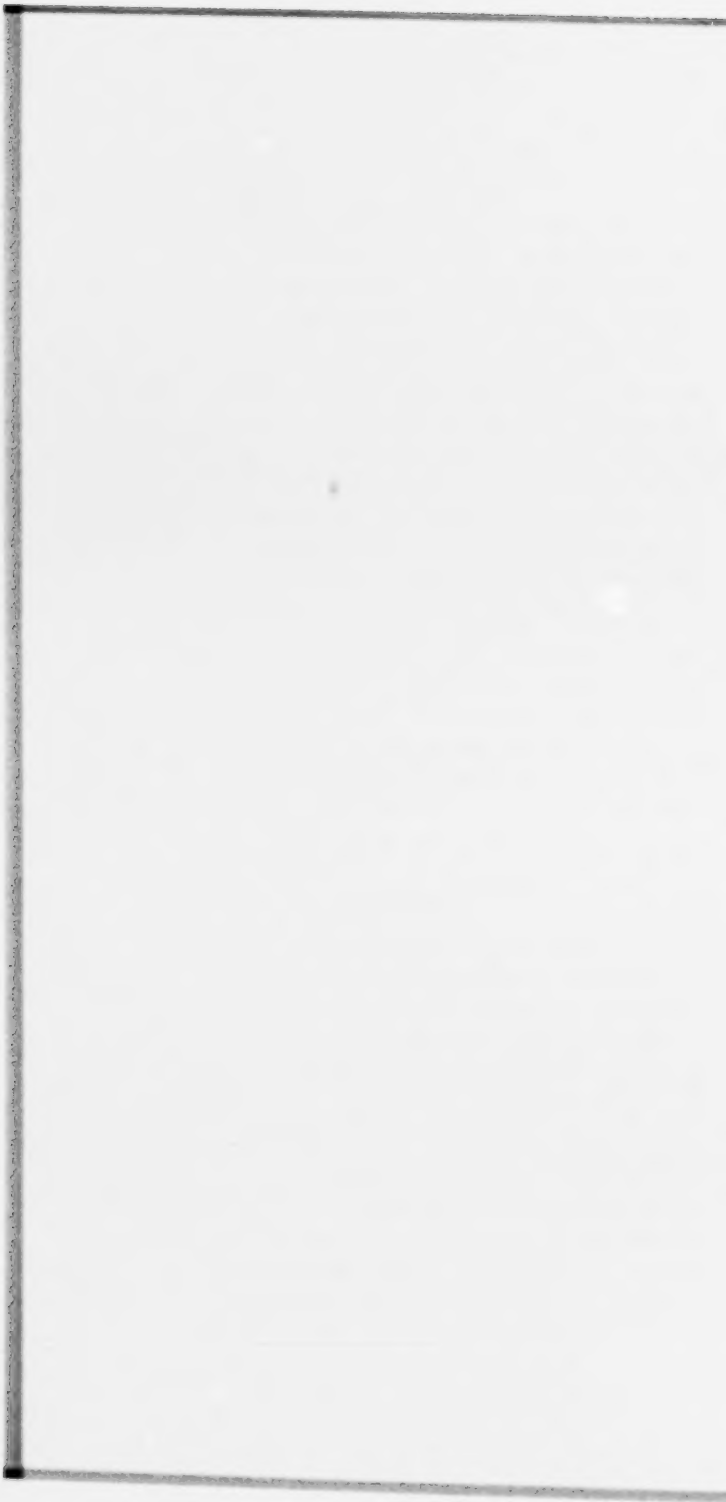
The evil is not in the predictions of price increases nor the allegations that they were false, misleading or malicious. The evil is in the fact that they were jointly made.

III. In addition to erroneous interpretations of Noerr and Trucking Unlimited, this cause presents a substantial question of profound importance never before considered by the Court. The issue is whether joint lobbying, in the circumstances alleged, can ever run awry of the antitrust laws. This line of argument acknowledges that the purposes of the Sherman Act are avowedly political, as well as commercial, a proposition made explicit in United States v. Aluminum Co. of America, 148 F. 2d 416, 427 (2d Cir. 1945):

> Be that as it may, that was not the way that Congress chose; it did not condone 'good' trusts and condemn 'bad' ones; it forbad all. Moreover, in so doing it was necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direct of a few.

As Walden, supra, 14 U.C.L.A. L. Rev. at 1249 argues:

> . . . concentrations of economic power can be as potent in the legislative arena as in the market-place, particularly when, as is true in so many instances in the case of lobbying, there is no countervailing power. Clearly the right to petition envisions some collective activity in the course



of its exercise by virtue of its being so closely conjoined with a right to peaceably assemble. But no violation of the right would occur if large collective enterprises were forbidden from further combining their economic power to effectuate legislative goals. And certainly the persistent danger of subversion of the legislative process if they are permitted to combine are more significant to the economy than the mere control of market prices and production. In other words, the suggestion is that the Sherman Act be utilized to prevent horizontal combinations of large competitors with common legislative programs. While this may seem a novel proposal, the Sherman Act has long had social as well as economic objectives. The suggestion coincides with these non-economic goals and, in the long term, may prove more

> significant in preserving a free society than continued enforcement efforts along traditional lines. (citation omitted).

By any criteria of political influence -- use of media, amount of expenditures, success in reversal of opinion polls, prestige of participants, cohesiveness of presentation, weakness of regulatory structure -- the opponents of Initiative 256 in Washington State were a dominant lobby. This record beckons the Court to explore and confirm that conclusion through the application of the anti-trust laws.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed February 25, 1974]

WILLIAM H. RODGERS, JR., Plaintiff-Appellant,	)	
vs.	)	No. 71-2859
FEDERAL TRADE COMMISSION, Defendant-Appellee.	)	

Appeal from the United States District Court from the Western District of Washington

Before: KOELSCH and TRASK, Circuit Judges, and JAMESON,*District Judge

PER CURIAM:

William H. Rodgers, Jr., an assistant professor of law at the University of Washington School of Law, appeals from a final judgment of

* Honorable William J. Jameson, Senior United States District Judge, from the District of Montana, sitting by designation.

the United States District Court that dismissed his complaint for a declaratory judgment and equitable relief in a proceeding which had originated before the Federal Trade Commission (Commission). The judgment was pursuant to a motion to dismiss filed by the Commission.

This litigation is an outgrowth of a proposal which was taken to the voters of the State of Washington as Initiative 256, an "anti-litter" measure. If adopted, it would have forbidden the sale in Washington of beer and soft drinks in containers not having a refund value of at least five cents. It was rejected by the voters on November 3, 1970, by a margin of 51 percent to 49 percent. By letter dated December 11, 1970, appellant wrote to the Secretary of appellee Federal Trade Commission, and requested that the Commission investigate what appellant described as "unfairand deceptive practices in commerce" arising out of that campaign.

The letter with documentation attached set forth the "facts upon which allegations are based." 1/ Appellant's letter then concluded that on the basis of those alleged facts the Commission could find that the

opponents of the initiative measure had combined "in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices."

On January 26, 1971, Mr. Charles A. Tobin, the Secretary of the Commission, responded to appellant's letter and stated that the Commission found no actionable violation "even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception."

With administrative relief denied, the appellant, repeating and embellishing the allegations in his earlier letter, 2/ filed an action against the Commission in the District Court on April 8, 1971.

The complaint requested a judgment ordering the Commission to undertake an investigation under what it alleged was a correct interpretation of the law and asked for a declaration that the practices which the plaintiff described were violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and of the Sherman Act, 15 U.S.C. § 1 et seq. After oral

argument upon the memoranda filed, the District Court denied appellant's motion for summary judgment and granted the Commission's motion to dismiss upon the grounds (1) that it was a matter committed to the discretion of the Federal Trade Commission; and (2) that the action was barred by the Supreme Court's decision in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

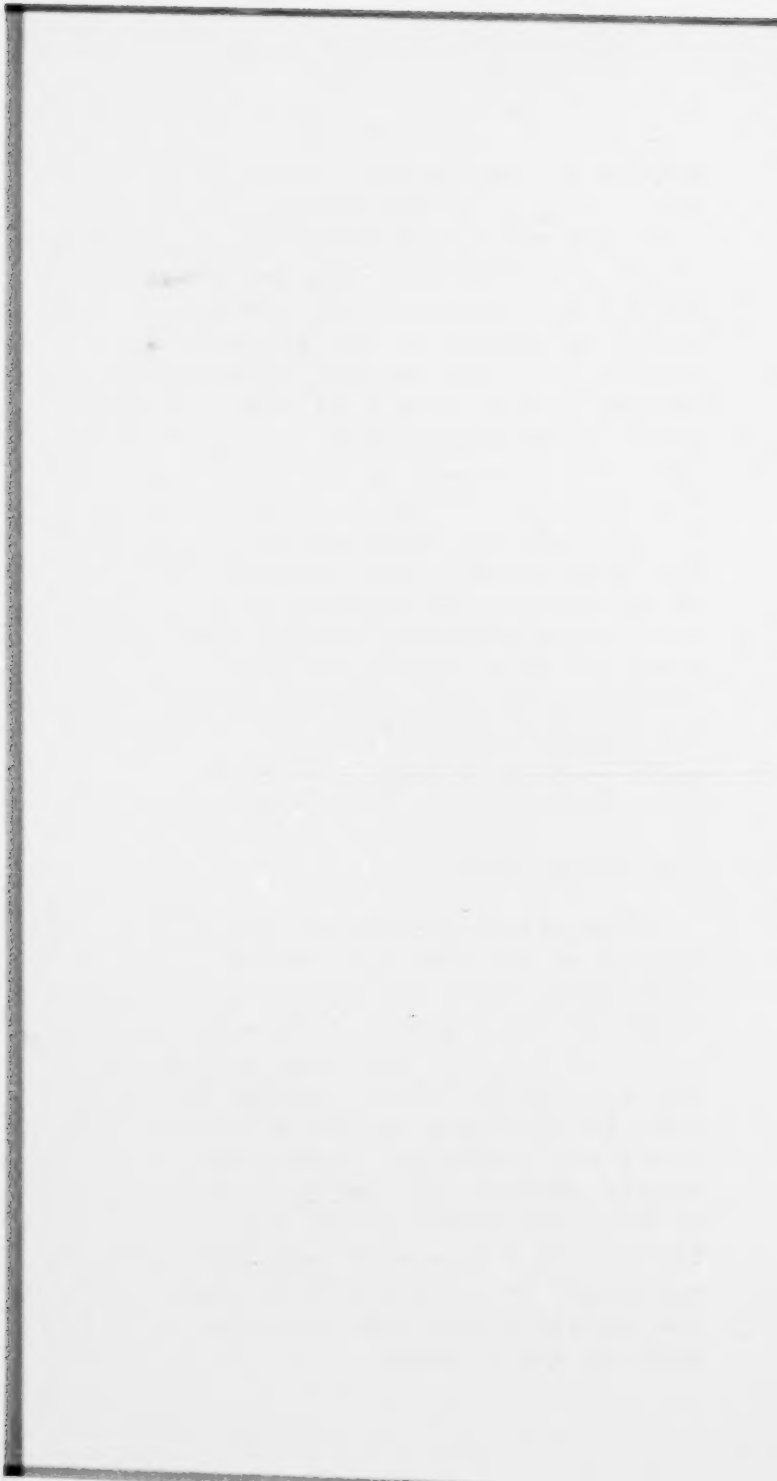
Assuming without deciding that the decision of the Commission in this case is reviewable under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, we go directly to the merits of appellant's claim. The Federal Trade Commission in rejecting his contentions, pointed out that although this was not activity designed to influence a legislative body, the people, acting directly through either the initiative or referendum, are exercising the same power of sovereignty as that exercised by the legislature in passing laws. The Washington courts have so held:

> "In this case we have, instead of statute, an initiative measure limiting the taxing power. That, however, can make no difference, for the latter is as much a legislative

act as is the former. By Article 2, § 1, Amendment 7 to the State Constitution, it is provided that the legislative authority of the state shall be vested in the legislature, with an express reservation in the people of the power to propose bills and laws and to enact or reject the same at the polls. The first power so reserved is the initiative. The passage of an initiative measure as a law is the exercise of the same power of soveriegnty as that exercised by the Legislature in the passage of a statute." Love v. King County, 181 Wash. 462, 44 P.2d 175, 178 (1935).

The Commission noted:

"The proscriptions of Section 5 of the FTC Act, as we view them, like the proscriptions of the Sherman Act, are tailored for the business world, not for the political arena. We fail to perceive in the allegations any situation involving unfair methods of competition or business combination characterized by express or implied agreement or understanding that the participants will jointly give up their trade



freedom, or undertake to take away the trade freedom of others. The cited representations, even if jointly made, alluding to higher prices, increased costs, economic hardships, and the like, which would assertedly be occasioned by passage of the subject legislative measure, appear to us to have been, at most, joint efforts to influence legislation.

"Even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity, particularly in connection with legislative processes. Nor would illegality attach because joint action may have been here undertaken on the premise of economic advantage, not merely political interest." Letter of Charles A. Tobin, Secretary, Federal

Trade Commission, to William H. Rodgers, Jr., Jan 26, 1971, in Brief of Appellant, Appendix at 10, 11-12.

The Commission then decided that action on the complaint of appellant under the Federal Trade Commission Act was not warranted. It relied upon Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961).

Appellant strenuously argues that the Commission and the District Court which reviewed the Commission's order incorrectly construed the reach of the Noerr doctrine. He places the issue which he raises in perspective by stating in his opening brief:

> "[I]t is urged on this appeal that the allegations to the FTC make out a case of overwhelming political influence in bringing about anti-competitive results from governmental action so complete and so thorough as to constitute an illegal instance of monopolization under the antitrust laws. Insofar as appellant is aware, this issue is being presented to an appellate court

> for the first time. The case presents an appealing occasion for application of the laws against monopoly to political campaigns." Brief of Appellant at 6.

Whatever appeal the facts of this case hold out to appellant, we have neither the inclination nor the authority to discard the rationale and the decision of the Supreme Court in Noerr. That case, upon which the Federal Trade Commission and the District Court principally relied, was a private antitrust action by the motor truck operators against the railroads. The substance of the Sherman Act violation charged was that the rail carriers had mounted a far reaching and "visious, corrupt and fraudulent" publicity campaign against the truckers which was designed to foster the adoption and retention of laws and law enforcement practices intended to damage and destroy the truckers as competitors. The Court held that the Sherman Act did not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. A contrary holding, said the Court, would impute to the Sherman Act

a purpose to regulate not business activity but political activity, a purpose which would have no basis in its legislative history. Such a construction would also interfere with the right to petition.

Said the Court:

"Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anti-competitive purpose it may have

had." 365 U.S. at 139-40.

Noerr was followed a few years later by United Mine Workers v. Pennington, 381 U.S. 657 (1965). There the unlawful conspiracy alleged was one between mine owners and unions to cause the Secretary of Labor to establish unreasonably high wages to force the complainant out of business. Thus the improper influence was not to cause passage of legislation but to cause executive action. The Court upheld the position it had announced in Noerr:

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

More recently California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), reaffirmed the rationale of Noerr and of Pennington. That case, however, involved allegations that the conspiracy was to deter the competitors in their use of administrative and judicial proceedings so

as to deny them the right to free and unlimited access to those tribunals. The result would be to discourage and ultimately prevent the competitors from invoking the processes of the administrative and judicial tribunals. This, the Court said, could bring the situation within the "sham" exception of Noerr which would apply where the activity complained about is a mere screen for what in fact is an attempt to interfere with the business relationships of a competitor. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)

Neither Trucking Unlimited nor Pennington lends support to appellant's arguments here. Both the supporters of Initiative 256 and its opponents had equal right to submit their arguments to the electorate at large. No charge is made of interference with voters at the polls or any infirmity in the election tabulation. The arguments of appellant fall directly within the rule of Noerr and the cases following it. Cases relied upon by appellant such as Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969), and Harmon v. Valley National Bank, 339 F.2d 564 (9th Cir. 1964), are not apposite. 3/

One other argument that appellant made orally was that Washington State law was violated because that law "forbids corporations with a majority of out-of-state shareholders from making contributions in local initiative campaigns." No such charge was made in the complaint to the Federal Trade Commission except as it was referred to in "an unpublished draft of a paper describing the initiative campaign which I have prepared for possible publication." An examination of this document fails to disclose any direct charge of violation of Washington State law 4/ and no facts were submitted to the Commission which would support any charge of illegality.

An examination of the complaint filed indicates that there was nothing before the trial court which would require it to engage in a substantial inquiry. Taking the letter presented to it and the exhibits attached, the issue was whether Noerr controlled or, at the most, whether the allegations presented a matter within the Noerr exception. We believe that the Commission acted within the scope of its authority and that its action was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A),

(C); see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-16 (1971). The trial court correctly decided the issue and its decision is affirmed.

Footnote 1 (Reference page 26)

"Simply stated, the illegality here alleged is that the grocery chain stores and the manufacturers of beer and soft drink combined, in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices. At times these representations were made through the coordinating medium of Citizens Committee Against 256, at times they were made directly--for example, through the use of the stickers promising price increases. No doubt exists that if these dire threats to raise prices were implemented in a joint move by the affected industries after passage of the initiative a prima facie case of price fixing would be established. No less a violation has occurred when the industries join together with a threat of price increases to coerce the consumer to reject a ballot proposition. What happened was that the manufacturers and chains, in the course of the campaign, announced a joint price

> move to take effect after the election and upon the condition of the passage of 256. Saying that there is an agreement to fix prices established the violation. If there was no agreement, then the representation was false and unlawful on that separate ground. My own view is that the agreement was proven by the concerted, massive and planned move to threaten the consumer with . . . 48 cent increase for each six-pack of a number of different products." C.T. at 35.

Footnote 2 (Reference page 27)

Appellant in his brief stated that in making his allegations in his complaint he had "repeated and refined" the allegations that were made to the Federal Trade Commission. Among the "refinements" was an allegation not made to the Federal Trade Commission that the conspiracy "was accomplished in part in violation of Washington State law which forbids corporations with a majority of out-of-state shareholders from making contributions in local initiative campaigns."

Footnote 3 (Reference page 35)

Sun Valley and Harmon involved the possible loss of antitrust immunity, relative to a concerted attempt to influence executive action, since the official whose favorable decision was sought was himself alleged to be acting unlawfully i.e., as a member of the conspiracy. Similarly, the result in this case is not controlled by Sacramento Coca-Cola Bottling Co. v. Chauffeurs Local 150, 440 F.2d 1096 (9th Cir.), cert. denied, 404 U.S. 826 (1971). In that case, which also involved administrative decisionmaking, the Noerr exemption was held inapplicable because the defendants sought to influence "public officials engaged in purely commercial dealings" and employed tactics including "threats and other coercive measures." 440 F.2d at 1099. Neither condition is satisfied here.

Appellant's reliance upon Isreal v. Baxter Labs, Inc., 466 F.2d 272 (D.C. Cir. 1972), and Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972), is also misplaced. Each of these cases involved alleged attempts to misuse administrative processes in order to further primary anticompetitive objectives.

Such activity, if proved, would fall within the "sham" exception of Noerr as interpreted by the Court in Trucking Unlimited. 404 U.S. at 515-16. The case before us here, however, is distinguishable in two respects. First, the allegedly unethical conduct of the "conspirators" herein occurred solely within the "political arena," not within an administrative or judicial context. See Trucking Unlimited, supra, at 513, 516. Secondly, the materials brought to the attention of the Commission did not indicate that the opponents of Initiative 256 had acted primarily to attain anticompetive goals or that their actions had resulted in an abuse of the initiative proceedings.

Footnote 4 (Reference page 36)

C.T. at 14-15.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM H. RODGERS, JR., Plaintiff

v.

FEDERAL TRADE COMMISSION, Defendant

Filed September 17, 1971

(Civil Action No. 9612)

JUDGMENT GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

The above-entitled matter having come on for hearing on September 17, 1971, on defendant's MOTION TO DISMISS and plaintiff's MOTION FOR SUMMARY JUDGMENT, plaintiff appearing pro se and defendant appearing by Albert E. Stephan, Assistant United States Attorney; Harold D. Rhynedance, Jr., Assistant General Counsel; and Thomas F. Howder, Attorney; and the Court having considered the record and briefs herein and heard oral argument and finding that (1) this is a matter committed to

the discretion of the Federal Trade Commission; and (2) the action is barred by the Supreme Court's decision in Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and being fully advised, it is

ADJUDGED, ORDERED AND DECREED that defendant's MOTION TO DISMISS be granted and that plaintiff's MOTION FOR SUMMARY JUDGMENT be denied.

Walter T. McGovern
United States District Court Judge

APPENDIX C

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Office of the Secretary

January 26, 1971

William H. Rodgers, Jr.
Associate Professor of Law
University of Washington
Condon Hall
Seattle, Washington 98105

Dear Professor Rodgers:

The staff has carefully reviewed your complaint, submitted by letter dated December 11, 1970, together with exhibits identified A through F. Your complaint alleges conspiratorial, unfair or deceptive acts on the part of certain soft drink and beer producers, retail grocery chains and possibly others, in the form of joint "price" and other representations to the public in the course of a recent initiative campaign in the State of Washington.

In support of your complaint, you advance the proposition, in substance, that because (1) the Federal Trade

Commission specifically has forbidden price fixing in grocery chains; (2) collusion on prices routinely has been condemned under the antitrust laws; and (3) deceptive techniques in advertising and the failure to make material disclosures have been condemned in adjudicated cases under the Act (i.e., under Section 5 of the FTC Act) the subject initiative campaign representations should be considered unfair or deceptive trade practices within the prohibitions of Section 5 of the FTC Act.

The initiative proposal (Initiative 256) as you describe it, would have forbade the sale of beer and soft drinks in containers not having a refund value of at least five cents. It was defeated by a narrow margin.

You advise that the container industries and the supermarkets strongly opposed the measure on the grounds, among others, that it would lead to serious economic hardships by causing lay-offs by bottle and can manufacturers and inconvenience at the retail level. Press releases, campaign literature and election stickers, inter alia, contained such representations as "50 per cent higher prices for beer, soft drinks"; "It will increase your

grocery bill $60.00 annually for an average family of four"; and "Deposits and Handling Costs Will Add 48 cents per Six-Pack Under Initiative 256."

As you succinctly put it, "[s]imply stated, the illegality here alleged is that the grocery chain stores and the manufacturers of beer and soft drink combined, in both vertical and horizontal agreements, to make price representations to the public that constituted unfair and deceptive trade practices."

Whether such alleged collusive or deceptive acts constituted "trade" practices within the contemplation of Section 5 of the FTC Act, rather than merely political activity to influence the passage or non-passage of legislation, thus appears to be a threshhold question.

It is, we believe, well established that through either the initiative or the referendum, the people are a coordinate legislative body, exercising the same power of sovereignty in passing on measures as that exercised by the legislature in passing laws. Love v. King County, 44 P.2d 175, 181 Wash. 462; State v. Hinkle, 286 P. 839, 156 Wash. 289; State v.

Paul, 151 P. 114, 87 Wash. 83.

The proscriptions of Section 5 of the FTC Act, as we view them, like the proscriptions of the Sherman Act, are tailored for the business world, not for the political arena. We fail to perceive in the allegations any situation involving unfair methods of competition or business combination characterized by express or implied agreement or understanding that the participants will jointly give up their trade freedom, or undertake to take away the trade freedom of others. The cited representations, even if jointly made, alluding to higher prices, increased costs, economic hardships, and the like, which would assertedly be occasioned by passage of the subject legislative measure, appear to us to have been, at most, joint efforts to influence legislation.

Even assuming a wrongful motive, for purposes of consideration of your complaint, and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity, particularly in connection with legis-

lative processes. Nor would illegality attach because joint action may have been here undertaken on the premise of economic advantage, not merely political interest. The Supreme Court has stated in this connection, in Sherman Act context:

> "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." Eastern Railroad President's Conference v. Noerr Motor Freight, Inc. 365 U.S. 127, 139, (1961).

Incipient Sherman Act violations are clearly not here involved. The Federal Trade Commission Act, no less than the Sherman Act, is directed to commercial adtivities, not political

activities. Specific legislation, careful of the bar of the first amendment, should govern the standards of ethical conduct in political matters, not antitrust or trade regulation statutes. In such connection, the Supreme Court in Noerr (supra at 140) commenting on the "third-party technique," a technique also involved in your complaint, stated:

> "As pointed out above, the third-party technique which was aptly characterized by the District Court as involving 'deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information,' depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations, is one which falls far short of the ethical standards generally approved in this country. It does not follow, however,

> that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity."

No violation of the Sherman Act can be predicated upon group efforts to influence the passage or executive enforcement of laws. Eastern Railroad President's Conference v. Noerr Motor Freight, Inc. supra; United Mine Workers v. Pennington, 381 U.S. 657 (1965). Cf. Trucking Unlimited et al. v. California Motor Transport Co., et al., U.S. Court of Appeals for the Ninth Circuit, No. 22, 462, October 5, 1970. We believe this rule also obtains with respect to Section 5 of the FTC Act.

It is therefore our view that action on your complaint under Section

5 of the FTC Act is not warranted. I would like to thank you, however, for your submission of this matter for our consideration. Activity and interest in areas such as this within our colleges and law schools, appear to us most commendable.

Sincerely yours,

[Chas. A. Tobin]

Secretary

APPENDIX D

STATUTES INVOLVED

1. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), provides:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

2. Section 1 of the Sherman Anti-Trust Act, 15 U.S.C. § 1, provides:

> § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided. That nothing contained in sections 1 to 7 of this title shall render illegal, contracts

or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum

resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.